Bantek West, Inc. *and* United Federation of Security Officers, Inc. *and* Mouhamadou Ndaw *and* Carlos Romero. Cases 10–CA—35136, 10–CA—35138, 10–CA–35228, and 10–CA–35315

June 23, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 10, 2005, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions. The General Counsel filed an exception and a supporting brief, and also filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order[3] as modified.

AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 2.

"2. By discharging Mouhamadou Ndaw on or about July 23, 2004, because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bantek West, Inc., Marietta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its facility in Marietta, Georgia, copies of the attached noticed marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2004."

Dated, Washington, D.C. June 23, 2005

Robert J. Battista , Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lauren Rich, Esq., for the General Counsel.
James J. Cusack and *James W. Cusack, Esqs.*, for the Respondent.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by discharging employee Mouhamadou Ndaw for his union activity, we find, in agreement with the judge, that the Respondent's stated reason for the discharge was pretextual. We also find it unnecessary to pass on whether the Respondent's letter discharging Ndaw, dated July 23, 2004, was actually written on July 22, 2004, as the judge found.

There are no exceptions (a) to the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating employees, by creating the impression that employees' union activities were under surveillance, by threatening that the selection of the Union was futile, by prohibiting conversations relating to the Union on company time while permitting nonwork related conversations regarding other subjects, and by prohibiting employees from discussing their terms and conditions of employment; (b) to the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by issuing a warning to employee Carlos Romero because of his union activities; and (c) to the judge's dismissal of other 8(a)(1) allegations.

[2] We will amend the judge's conclusions of law to reflect his finding, which we adopt, that the Respondent discharged Ndaw on July 23, 2004.

[3] We shall modify the judge's recommended Order to be consistent with *Excel Container, Inc.*, 325 NLRB 17 (1997).

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Atlanta, Georgia, on January 6 and 7, 2005, pursuant to a consolidated complaint that issued on December 13, 2004.[1] The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by various acts and discharged Charging Party Mouhamadou Ndaw and warned Charging Party Carlos Romero because of their union activities in violation of Section 8(a)(3) of the Act. The Respondent's answer denies all violations of the Act. I find that the Respondent did violate the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Bantek West, Inc., the Company, is a Colorado corporation engaged in the business of replenishing currency in automated teller machines in various locations throughout the United States including the Atlanta, Georgia, metropolitan area which is served from the Company's Marietta, Georgia facility. The Company, in conducting its business, annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Georgia. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Federation of Security Officers, Inc., the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union initiated an organizational campaign among the Company's employees in early 2004. Three employees, Carlos Romero, who initially contacted the Union, Mouhamadou Ndaw, and Horace Willis, solicited union authorization cards from their fellow employees. An election was held on March 12. The Union was certified as the collective-bargaining representative of the Company's guards, including drivers, messengers, balancers, technicians, and auditors on March 22. The Union, in a letter dated April 8, informed the Company that five employees were being designated as stewards. The first two stewards listed were Charging Parties Mouhamadou Ndaw and Carlos Romero. Negotiations have not yet resulted in a contract. There are no 8(a)(5) allegations in the complaint. Only one 8(a)(1) allegation predates the election. All remaining alleged violations occurred after the election.

The employees on routes who work in teams of two or three, depending upon the Company's assessment of the risk in the area being served. All are armed. A two-man team consists of a driver and a messenger. The driver drives the armored vehicle to the ATM machines on that route. The messenger replenishes the cash in the ATM machines. The driver does not leave the vehicle. A three-man team consists of a driver, a messenger, and a guard. The guard accompanies the messenger as he replenishes the cash in the ATM machine. These employees are directly supervised by a route supervisor who reports to the Marietta branch manager. In early 2004, the branch manager was Rick Fortner. In late April, Shawn Hankins became the branch manager. Hankins reports to Georgia State Manager Larry Trice. Although serving as state manager, Trice is regularly involved in matters arising at the Marietta facility.

B. The 8(a)(1) Allegations

On March 10, 2 days prior to the election, Company President Leif Houkum came to Marietta and spoke to the employees stating his views opposing unionization. In a question and answer period following the formal presentation, employee Carlos Romero asked several questions. Thereafter, Joyce Redman, a consultant with the Company, asked Romero to speak with her. They spoke alone in the office of State Manager Trice. Redman mentioned Romero's participation in the meeting and asked what his prediction was regarding the outcome of the election. She then asked whether he had gone to "that union meeting at the hotel." Romero responded by asking how she knew that it was a union meeting. Redman answered, "[B]elieve me, I know everything, just tell me if you went to it or not." Romero did not respond. She then questioned whether Romero would "like to work in a union environment." He answered that it would not bother him and explained that he was thinking of going into law enforcement and "law enforcement has a union," an apparent reference to the Atlanta, Georgia, police department. Romero asked Redman why she had brought him into the office and she answered that she liked him, that he "always spoke up at the meetings." Redman did not testify.

The complaint, in paragraph 8, alleges that Redman, admitted in the answer to be an agent of the Respondent, interrogated employees and created the impression that their activities were under surveillance. Although Romero had solicited authorization cards and questioned President Houkum, the Respondent had no reason to know, and was not privileged to interrogate him regarding, whether he had participated in a particular union event. Redman, by repeating her question, asking Romero to state "if you went to it or not" after having informed him, "I know everything," was coercive. Her identification of the meeting at the hotel as a union meeting followed by her statement that she knew everything created the impression that employee union activities were under surveillance. I find that the Respondent interrogated employees and created the impression that

[1] All dates are in 2004 unless otherwise indicated. The order of the Charging Parties has been altered from as they appear on the complaint. The order is chronological on the basis of the number of the charge. The charge in Case 10–CA–35136 was filed on August 3, the charge in Case 10–CA–35136 was filed on August 2, the charge in Case 10–CA–35228 was filed on September 29, and the charge in Case 10–CA–35315 was filed on November 15.

their union activities were under surveillance as alleged in the complaint.

In early April, employee Mouhamadou Ndaw was informed by Branch Manager Rick Fortner that his route assignment had been designated as a two-man rather than a three-man team route. According to Ndaw, "the next day" he protested the change to State Manager Larry Trice who dismissed his complaint stating that the change followed a company evaluation of the safety of the route. Ndaw stated, "[T]hat's why we're getting together as employees, so we can get what we want." Trice became angry and stated to him that he knew that Ndaw was "one of the key members of this union." He continued, stating, "I don't even care about this Union, and I will do anything to stop this Union." Trice did not deny making the foregoing statements.

Paragraph 7 of the complaint alleges that the foregoing statements constituted a threat that support of the Union was futile and created an impression of surveillance. Ndaw had not been present for the election or engaged in any union activity in the month of March; he had been in Africa. He was uncertain when the conversation with Trice occurred in relationship to his appointment as a steward on April 8, testifying that the conversation was "around that time." The record does not establish that this conversation occurred prior to Trice's receipt of the letter of April 8. The statement was true, Ndaw was one of the key members of the Union. I shall recommend that the impression of surveillance allegation be dismissed. Trice's statement that he did not "even care about this Union," revealed an indifference to the bargaining obligation that had been established as a result of the employees' selection of the Union as their collective bargaining representative. His further statement that he would do "anything to stop this Union," following Ndaw's statement that the employees had gotten together "so we can get what we want," threatened that the employees' selection of the Union as their collective bargaining representative would be futile. *El Monte Tool & Die Casting*, 232 NLRB 186, 188 (1977). I find that the foregoing threat violated Section 8(a)(1) of the Act.

On July 22, Union President Ralph Purdy wrote the employees of Bantek about various issues relating to negotiations that concluded with the following final paragraph:

> Enclosed you will find payroll deduction forms which need to be completed by you. These are for your union dues. The dues are $7.50 per week. The dues will not go into effect until the contract is voted and ratified by the members. I would ask that once you complete the form give it to Carlos Romero the Chief Union Steward.

On August 2, State Manger Trice called Romero into his office when Romero returned from his route. Following Romero's comment that he had just completed a 12-hour shift, Trice asked Romero to explain to him the payroll deduction form, and then immediately stated that "this is ridiculous what they're [the Union] doing here, you know they haven't got a contract yet, and they're not supposed to sign those forms until they get a contract in place." Romero answered that he did not know what Trice was talking about. Trice asked whether he had received a letter from the Union, and Romero, who had been working for the past 12 hours, answered that he had not yet checked his mail. Trice then showed him the letter, pointing out that Romero's name appeared in the last paragraph, and stated, "give me a break," that he, Trice, was not stupid. Romero repeated that he did not know anything about the letter. Trice stated that his job was State Manager and that he would make sure that no employee signed "that payroll deduction form until there's a contract in place." He then stated that he did not want Romero "to go around asking people . . . to sign a payroll deduction form. It is not fair for people to start paying dues when there is no contract in place." Romero, who had by then read the letter, stated that he did not believe people would start paying dues, that the letter stated, "the dues will not go into effect until a contract is voted and ratified by the members." Trice answered that the foregoing statement did not guarantee that they would not start paying dues.

Trice admitted speaking with Romero. He explained that he did so because two employees had questioned him about the contents of the letter "instead of going to Mr. Romero." Trice denied responding to the employees, testifying that he did not feel that it was his job to interpret what the letter stated, "[t]hat's what the stewards are for." He told the employees to "go see Carlos." Trice did not specifically deny telling Romero not "to go around asking people . . . to sign . . . a payroll deduction form." He effectively acknowledged that restriction by admitting that he informed Romero that "on company time, that the union should not be discussed," that Romero had the right "to speak to the employees off company time."

Paragraph 9 of the complaint alleges that the Respondent interrogated employees and threatened to interfere with their right to sign payroll deduction forms. Trice's asking whether Romero had received the letter sent to all employees did not constitute coercive interrogation, and I shall recommend that that aspect of paragraph 9 of the complaint be dismissed. I credit Romero and find that Trice stated that he would make sure that no employee signed "that payroll deduction form until there's a contract in place" and directed Romero not "to go around asking people . . . to sign." In so doing, the Respondent interfered with the employees' rights in violation of Section 8(a)(1) of the Act. Trice's admitted restriction prohibiting conversation relating to the Union on company time constituted promulgation of gag rule as hereinafter discussed with regard to paragraph 13 of the complaint.

On August 20, employee Romero was supposed to be serving as a guard while an armored vehicle was backing into the loading area at the Marietta facility. Trice observed that Romero, rather than assuming the position of the guard, was engaged in conversation with employee Theonita Fannin, who had just gotten off of work. He directed Romero to come to his office where he asked Romero what "kind of conversation" they had been having. Romero responded that the conversation was "personal business." Trice stated, "I thought … we spoke this about [sic], I don't want you to conduct any union activities when you're on the company time." Romero asked how he knew that he and Fannin had been talking about the Union. Trice answered that Romero had "been identified as a union steward." Romero received a counseling for neglecting his job duties. Trice admitted asking Romero about the nature of the

conversation in which he had been engaged, and he did not deny the comment prohibiting him from engaging in any union activity "on company time" or being "identified as a union steward."

The following day, Trice spoke with Fannin. He asked whether the conversation in which she and Romero had engaged was business or personal. Fannin answer that it was "company business, you know, about the Union." Trice informed Fannin that "during the hours that we work, we shouldn't be discussing union business." Fannin answered that she was not aware of that and that she would not do it anymore.

The complaint, in paragraph 10, alleges that the Respondent engaged in the surveillance of employee union activities and interrogated employees between July 4 and September 6, and paragraph 11 alleges that the Respondent did so on or about August 20. The General Counsel's brief indicates that the interrogation of Fannin relates to paragraph 10 and the interrogation of Romero relates to paragraph 11. The complaint does not allege that the counseling of Romero violated the Act, and the evidence establishes that he was legitimately counseled for neglecting his job duties. Romero and Fannin were on company property and Romero was supposed to be serving as a guard. There is no evidence establishing the creation of an impression of surveillance, and I shall recommend that those allegations be dismissed. Trice's statement regarding Romero being a union steward reveals that he simply assumed that any conversation that the union steward had with other employees related to the Union. Trice had no need to inquire of either Romero or Fannin regarding the subject of the conversation since he had directly observed that Romero was not performing his guard duties. Fannin was going home. Trice had prohibited Romero from having any conversation relating to the Union on company time, thus his inquiry regarding the nature of the conversation required Romero to admit to having violated that unlawful restriction. His questioning of Fannin also revealed that the Union had been the subject of the conversation. I find that the Respondent's questioning of Romero and Fannin regarding the nature of their conversation was coercive and that, in so doing, the Respondent violated Section 8(a)(1) of the Act.

On September 8, employee Jimmy Revell asked Romero whether Labor Day was a paid holiday. As Romero was preparing to leave from work, Trice summoned him to his office and asked Branch Manger Shawn Hankins to join them. Hankins did so. Trice addressed Romero stating that it had been brought to his attention that Romero was "conducting union activity. I don't want you to do union activity when you're on the clock." Romero responded that he had not done so, that he had a "general conversation" in which he had responded to a question by Revell, stating that "Bantek don't pay holidays." Revell then made a comment regarding whether the Union was "trying to get that [paid holidays]," to which Romero responded that he did not know. Trice informed Romero that he should have referred Revell to a manager. Romero responded, "[Y]ou mean if a new employee come[s] up to me and ask me whether we get paid holidays, this and that, I should've told him that [to see a manager]?" Trice answered affirmatively and then stated, "[I]t is like if an employee asks you, you know, how much you make, you know, that's not his business." Trice did not recall this conversation. I credit Romero.

The complaint, in paragraph 12, alleges that the foregoing conversation constituted interrogation and an unlawful restriction upon discussion of "wages and/or other terms and conditions of employment." Insofar as Trice predicated his remarks by stating that the matter had been brought to his attention, there was no interrogation. The directive that employee questions regarding terms and conditions of employment such as paid holidays asked of the shop steward be directed to management was unlawful. Although Revell asked only about paid holidays, Trice's example regarding "how much you make" confirmed that the Respondent was prohibiting conversation among employees regarding wages and terms and conditions of employment as alleged in the complaint. That prohibition violated Section 8(a)(1) of the Act. *Double Eagle Hotel & Casino*, 341 NLRB No. 17, slip op. at 2 (2004).

The complaint, in paragraph 13, alleges that the restriction upon discussion of union matters announced by Trice to Fannin and to Romero on August 20 and on September 8 when he told him that he did not want him "to do union activity when you're on the clock" violated the Act. The Respondent's brief argues that Trice, in their August 20 conversation, referred Romero to the company policy which does contain a valid no-solicitation rule that prohibits solicitation on working time. The restriction announced by Trice was a gag rule that prohibited all conversation regarding the union or union activities on company time. Trice admitted that, on August 2, he informed Romero, "[O]n company time, that the union should not be discussed." The Respondent has no rule prohibiting conversation among employees relating to nonwork related matters. Romero and employees Theonita Fannin and Glen Dahlen confirmed that employees regularly discuss nonwork subjects including the presidential election, the successes and failures of the Atlanta Falcons professional football team, and other such nonwork subjects when they are driving from one location to another. The restriction upon discussion relating to the Union when there was no prohibition upon discussion of other nonwork subjects on company time violated Section 8(a)(1) of the Act. Paragraph 13 also alleges the prohibition upon discussion of wages and terms and conditions of employment as found in paragraph 12 to constitute a prohibition upon discussion of protected activities. In view of my finding the violation alleged in paragraph 12, any further finding would be cumulative.

On October 22, Branch Manger Shawn Hankins requested that Romero speak with him. The conversation occurred in Hankins' office. Hankins stated that he wanted to speak with Romero about a letter sent to President Houkum, noting that "there's nothing wrong with send[ing] a letter to the president, but usually it doesn't happen." Romero asked who wrote the letter, and Hankins replied that Romero did. Romero asked that Hankins call a witness. Hankins asked Route Supervisor Linwood Widener to join them, and Widener did so. Romero asked Hankins to tell him what was in the letter. Hankins responded by asking Romero to tell him what was going on. Romero answered, "I don't know what's going on." Hankins said, "[S]o you did write the letter." Romero answered, "[N]o," and again asked that Hankins tell him what was in the letter. Hankins,

who was looking at his computer screen, stated that there was a claim that employees were carrying handguns without permits and that there was mention of a strike. After Hankins explained what the Company would do in the event of a strike, he asked whether Romero knew why the next negotiating meeting was going to be in New York. Romero answered that he did not know. He requested a copy of the letter, and Hankins responded that he would give him a copy, but he never did so. Hankins did not address the conversation in his testimony, thus the testimony of Romero, which I credit, is uncontradicted.

Paragraph 14 of the complaint alleges that the foregoing conversation constituted interrogation. Hankins' accusation that Romero had written the letter was clearly coercive, so much so that Romero asked for a witness to be present. Despite the coercive nature of the encounter, there was an accusation and a denial, not an interrogation. The situation changed when Hankins addressed the movement of negotiations to New York. Hankins' attempt to learn what the chief steward knew about the change of venue constituted interrogation. He sought this information in the context of a coercive confrontation. Romero was unaware of the reason for the change in venue and informed Hankins that he did not know. Whether the change in venue was instigated by the Union as a bargaining strategy is not established by the record. What is established is that the Respondent, in a coercive encounter, interrogated the chief steward regarding his knowledge of a matter relating to negotiations. In so doing, the Respondent violated Section 8(a)(1) of the Act.

The foregoing actions of the Respondent confirm its animus toward the Union and the Respondent's commitment, as stated by Trice to Ndaw in April, "to do anything to stop this Union" and thereby render futile the employees' selection of the Union as their collective-bargaining representative.

C. The Discharge of Mouhamadou Ndaw

1. Facts

Employee Mouhamadou Ndaw was hired on November 9, 2000, and, at various times, worked as a driver, guard, and messenger. On occasion he was called upon to train new employees. Employee evaluations describe him as an excellent and valuable employee. Although State Manger Trice was unwilling to acknowledge that any employees at the Marietta facility were excellent, he acknowledged that Ndaw as a good employee and that there were many employees that he did not consider as good.

In February 2004, Ndaw was informed that his mother, who lived in Ndaw's native Senegal, Africa, was gravely ill. He signed a "REQUEST FOR TIME OFF" dated February 17, seeking to be off from March 1 through March 31. On February 23, former Branch Manager Rick Fortner signed the request, but did not check either the approved or disapproved block. A note at the bottom of the form states, "Must submit FMLA [Family Medical Leave Act] paperwork." Ndaw did not submit that paperwork. He recalled that he left on March 1. Because of plane delays, he did not return until 1 or 2 days after March 31.

Upon Ndaw's return he was returned to work. Branch Manager Fortner testified that although had not approved Ndaw's leave, he was told to return him to work. This occurred prior to Ndaw's conversation with State Manager Trice regarding his route assignment in which Trice stated that he knew that Ndaw was one of the key members of the Union and that he would "do anything to stop this union." Ndaw was the first steward listed in the Union's letter to State Manger Trice dated April 8.

Ndaw worked for about 2–1/2 weeks in April. On April 20, he called Fortner while on his route and explained that he was experiencing debilitating back pain and could not continue on the route. A replacement was sent. Ndaw had suffered recurring problems due to sciatica. He sought medical treatment. On Friday, April 23, Ndaw's physician, C. Duane Barklay, sent by facsimile copy, hereinafter referred to as fax, the following letter to Bantek:

> I examined Mr. Ndaw today for his complaints of back pain. He [h]as had problems since 1991, but had gotten much worse since February of this year.
>
> He has had medical therapy here but his desire is to return to Africa for local treatment for a three-month period of time. He is requesting that a Leave of Absence be granted.
>
> While conventional therapy here coupled with assignment to light duty could be also be an option I will support hs [sic] request for the leave of absence.
>
> He had been absent from work from 4-21-04 through 4-23-04 due to his back pain.

Ndaw called Fortner shortly after the fax was sent and informed him that he wanted time off for medical leave. Fortner said that he would review the request the following week and that it should be approved. The following week, on April 27, Ndaw called Fortner but got Shawn Hankins who had become the Branch Manager. He informed Hankins of his situation, and Hankins advised that he was already aware of it. Ndaw testified that Hankins informed him that "it should be okay."

Ndaw asked Hankins to contact Ann Webb in Human Resources regarding the FMLA form so that he could fill it out before leaving. Hankins advised that Webb was away from her desk and to call back to get the form before leaving for Africa. Ndaw went to a United Parcel Service (UPS) store located next to the apartment from which he was calling and sent a copy of the April 23 letter from his physician by fax to Webb. The parties stipulated that the fax was received at Bantek at 1:13 p.m. on April 27, but no company official admits receiving it, including Ann Webb who was purportedly in the human resources office on April 27.

Ndaw called Hankins three times to see if Webb had returned. He gave Hankins the fax number of the UPS store so that Webb could send him the FMLA form. Hankins told Ndaw to wait there and he did so. No fax was received. Ndaw testified that his back pain intensified and that he needed to lie down. He left the UPS store after paying in advance for the store to receive the fax for him. A receipt in the amount of $3 showing the time of 15:28:48 (3:28 p.m.) on April 27 was introduced into evidence in corroboration of this testimony. Ndaw left for Africa on April 28. He checked with the UPS store before leaving, but no fax had been received.

Branch Manager Hankins acknowledged speaking with Ndaw on April 27. He had spoken with former Branch Manager

Fortner and knew of Ndaw's desire to seek treatment in Africa. He also had seen the letter from Ndaw's physician. He recalls that Ndaw told him that he wanted to leave for Africa under the FMLA and that he replied that Ndaw needed to fill out the proper paperwork and "send it back to us."

Ndaw had reservations upon an international flight to Africa on April 28, returning on July 28 (GC Exh. 19). Ndaw flew to Africa on April 28.

Webb, who denied being aware of the fax transmission of the physician's letter dated April 23 by Ndaw on April 27, testified that Ndaw called her on April 30 and that she sent the FMLA form to the telephone number he provided, his home telephone number in Atlanta, by fax. Webb testified that, initially, she was unable to successfully send the fax and that Ndaw called back and she explained she was having problems sending the fax. Ndaw told her to send it again, and she was able to fax it. Webb testified that Ndaw told her that his wife would receive it and that his wife did confirm the receipt of the paperwork.

Notwithstanding the foregoing, it is undisputed that Ndaw himself never received or completed the FMLA forms. There was no contact between Ndaw and Bantek from late April, either the 27th according to Ndaw or the 30th according to Webb, until late July.

Ndaw testified that around July 20 he called Bantek from Africa to advise that he would be returning from Africa in about a week. He spoke with Webb who transferred him to Hankins' voice mail. Later that same day, he called back to speak to Hankins who again was not available. Webb assured Ndaw that Hankins had received his message.

Hankins testified that the first time that he heard from Ndaw after April was when he arrived at work on July 23 and found that he had a message on his voice mail from Ndaw advising that he would be returning to work on August 2.

Trice testified that on July 22, he wrote Ndaw the following letter:

> This letter will confirm that as of Thursday July 22, 2004, you have been discharged as an employee of Bantek West, Inc. Mr. Ndaw, you are being discharged due to job abandonment., Mr. Ndaw your last [day] of work was April 20th 2004. On April 23, 2004 we received a letter from Mr. Barclay explaining that you were under his care and he would support your request for leave. However, Bantek West, Inc. did not receive any such request from you our employee requesting a leave of absence.
>
> Mr. Ndaw, if you have not done so please, contact Ann Webb to make arrangements to return all Company issued equipment . . . .

Hankins acknowledged that he and Trice had been speaking about Ndaw "because we expected him back to work." He denied being involved in the decision to write the termination letter to Ndaw, but testified that Trice showed him the letter.

Hankins testified that he actually spoke with Ndaw on the afternoon of July 23, the same day that he had received the voice mail, and that he informed Ndaw that he had been terminated, that the letter "was sent out yesterday." He recalls that Ndaw protested, asking how he could be terminated if Hankins had approved his leave. Hankins testified that he denied that he had approved leave, stating, "I can't approve leave verbally, you have to fill out your paperwork." He requested that Ndaw "come see me Saturday, the next day," that Ndaw told him that he could not come "tomorrow," and that he told him, "if you can't make it Saturday, you come on Monday." Hankins testified that Ndaw agreed, saying, "[O]kay, I'll come see you on Monday." He testified that he reported to Trice that "Ndaw left a voice mail and I asked him to come see me tomorrow."

I do not credit the foregoing testimony. On July 23, Ndaw was in Africa with a plane reservation to return to the United States on July 28. He would not have agreed to meet with Hankins on Monday, July 26. I find that Ndaw was mistaken regarding calling from Africa on July 20. I find that he called twice on July 23 rather than July 20 and spoke with Webb, not Hankins, on both occasions. On the first occasion, Webb put him through to Hankins' voice mail at which time Ndaw stated that he intended return to work on August 2. On the second occasion, she assured Ndaw that Hankins had received his message. Webb did not address receiving the two telephone calls from Ndaw on either July 20 or 23.

Hankins testified that he had not deleted his voice mail at the point that he asserted he spoke directly to Ndaw in the second conversation on July 23. He testified that he made a tape recording of the morning voice mail message because, according to his testimony, he thought "maybe I need to keep this voice mail, because Mr. Ndaw is saying that I approved his leave, when I know he [sic] didn't." I do not credit the foregoing rationale for recording the voice mail message. Ndaw said nothing about Hankins having approved his leave in the voice mail message. He simply stated that he was returning on August 2.

On July 29, after arriving back in Atlanta, Ndaw called Hankins and restated that he would be returning to work. Hankins informed him that a letter had been sent to him. Ndaw obtained the letter from his ex-wife, the letter dated July 22. He called Hankins and stated that he did "not leave like that," referring to the claim of job abandonment, stating that he had requested medical leave and that he, Hankins, had told him that "it should be okay," and that, even though he did not receive the FMLA form that he had requested, he relied upon the conversation, "that verbal okay was enough to leave." Hankins responded that he did not recall having a conversation on April 27 and told Ndaw to write a letter explaining what happened. Rather than write a letter, Ndaw filed the charge herein.

Regarding the circumstances surrounding his sending the letter to Ndaw dated July 22, Tice testified that, in the latter part of July, "we" realized that there were individuals on the roster "that had not been paid in several weeks, several months," and that he reviewed the records of those employees to determine why they had not been at work. Upon reviewing the records of Ndaw and, according to Trice, one other employee, Weyman Maxson, he testified that he realized "there was no reason for Mr. Ndaw and at least one other employee that I recall," to have been absent from work. Trice made the decision to send letters of job abandonment to those two employees. He testified that he spoke with Hankins prior to the letter being sent, but he did not recall whether Hankins told him that he expected Ndaw to return.

Trice testified that, when the Company has an employee who has not been at work for some time, "we try to get ahold of that employee to find out the reason why." Trice testified that he tried unsuccessfully to call Ndaw. Despite his practice of attempting to find out the reason for the employee's absence, he made no other attempt to contact Ndaw prior to sending the termination letter. Trice's letter to Ndaw establishes that he was aware that Ndaw's physician stated that he would support Ndaw's request for a 3-month leave of absence. Despite that, he testified that he considered Ndaw to have abandoned his job because he had not been at work, and "there was no reason" for him to have been absent. When asked whether Ndaw was terminated because he had not been at work or because he had not requested a leave of absence, the reason stated in the letter, Trice answered that the failure to request leave "was in addition to the fact that he had not been at work. The note from the doctor covered two or three days that he had been seen by the doctor, where he had requested days off." Trice testified that he reviews the employee roster regularly, "definitely monthly," and that it was an "oversight" on his part that the termination did not occur sooner.

Ann Webb, whose title was not stated but who is the highest ranking human resources employee at Marietta, testified that the FMLA permits absences up to 12 weeks in a year and that, to her knowledge, Ndaw was terminated for over-staying his leave and because he never submitted a FMLA form.

The letter to employee Maxson, unlike the letter to Ndaw, does not mention failure to request a leave of absence or the last day that Maxson worked. It states:

> This letter will confirm that as of Thursday July 22, 2004, you have been discharged as an employee of Bantek West, Inc. Mr. Maxson, you are being discharged due to job abandonment.

On cross-examination, Trice admitted that he was unaware of the actual last day that Maxson had worked, that he was a part-time employee of Bantek "and was also working for the sheriff's department . . . [and that] exactly why he stopped showing up … I don't know."

On July 27, prior to Ndaw's return to Atlanta, the Company terminated Mohamed Haji for insubordination. The incident resulting in termination was not the first or only dereliction by Haji. On March 17, he received a written warning following receipt of a second report that he had been speeding. On March 25, he received an employee counseling report after leaving $1620 in the cash counter. On April 19th, he received a verbal warning after leaving the front doors to a building that he had serviced unlocked. Trice agreed that this incident constituted "a major security failure on the part of the company." Haji was reinstated on August 4.

2. Analysis and concluding findings

The Respondent was aware that Ndaw was a steward and a key member of the union. He had returned from Africa in early April prior to being named a steward and was returned to work. The Respondent's animus towards union activity is established by the various 8(a)(1) violations committed by the Respondent and specific animus toward Ndaw is established by Trice's threat of futility and reference to Ndaw as a key member of the Union. The termination of Ndaw was an adverse action directly affecting his employment. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982). I find that the General Counsel established that Ndaw's union activity was a substantial and motivating factor for the Respondent's action. *Manno Electric*, 321 NLRB 278 (1996).

All of the Respondent's managers were aware as of April 30 at the latest that Ndaw was not present. All of the Respondent's managers were aware that he was suffering from back pain and that his physician has stated that he would support Ndaw's request for a 3-month leave of absence in order to receive treatment in Africa. Although Ndaw had attempted to obtain the FMLA paperwork on April 27, he had not received it. I am inclined to believe that Webb, who denied receiving the fax of the physician's statement on April 27, was not present that day and, upon her return, attempted to rectify the situation. Whether her testimony regarding faxing the FMLA forms to Ndaw's wife is credible is immaterial since it is undisputed that no FMLA forms were submitted by Ndaw.

The letter discharging Ndaw for job abandonment states that the basis for the discharge was that Bantek "did not receive any such request from you our employee requesting a leave of absence." It makes no reference to overstaying FMLA leave. If I were to accept Hankins' testimony that he did not approve Ndaw's leave, that, "I can't approve leave verbally, you have to fill out your paperwork," Ndaw would have been terminated within the first 2 weeks of May for failing to report to work without obtaining a leave of absence. The failure of the Respondent to have done so is persuasive evidence that Hankins knew that Ndaw believed that he, Hankins, had given him permission to leave. That conclusion is confirmed by Hankins' admission that he expected Ndaw to return.

Contrary to Trice's testimony that, when reviewing Ndaw's file, he realized "there was no reason" for Ndaw to have been absent from work, he knew that there was a reason that Ndaw was absent. He had a copy of the letter from Ndaw's physician, and he refers to that letter in his letter of July 22 terminating Ndaw. That letter states that the physician would support Ndaw's request for a three-month leave of absence to obtain treatment in Africa. When asked whether Ndaw was terminated because he had not been at work or because he had not requested a leave of absence, the reason stated in the letter, Trice answered that the failure to request leave "was in addition to the fact that he had not been at work." Either rationale would have resulted in Ndaw's termination in early May.

The Respondent, in its brief, argues that Ndaw was "approved and granted FMLA leave in March." There is no evidence to that effect and it is contrary to the testimony of Ndaw who admits not filling out any FMLA paperwork and former Branch Manager Fortner who, when asked, "[D]id you ever approve his time away [in March]?" answered, "No." The FMLA permits an employee to take a total of 12 weeks for family or medical leave in a rolling 12-month period. Accepting the Respondent's argument, although premised upon the incorrect assertion that Ndaw had been on FMLA leave in March when he was absent from March 1 until April 1 or 2, a

total of 5 workweeks, he would have been entitled to 7 additional weeks of FMLA leave. He ceased work due to his back pain on April 20 and was absent continuously from April 21 until his termination. Thus, his 12 weeks of FMLA leave would have ended 7 weeks after April 21, on June 9. Although Webb testified that she understood that Ndaw was terminated for overstaying FMLA leave, she did not testify to when that leave expired. The Respondent's brief, asserting that Ndaw obtained FMLA leave in March, argues that he "did not present any evidence that the company intended to hold his job open for a period beyond any FMLA leave to which he may have been entitled." As the above calculation reflects, if overstaying FMLA leave had been the reason for Ndaw's termination, that should have occurred within 1 or 2 weeks of June 9, rather than 6 weeks later in late July. The failure of the Respondent to take any action against Ndaw in May for failing to submit FMLA paperwork or in June for overstaying FMLA leave for which he had never applied belies any claim relating to overstaying FMLA leave.

The failure of the Respondent to assert overstaying FMLA leave in the letter discharging Ndaw for job abandonment is compelling evidence that it was not the reason. The Respondent's assertion of this meritless claim in its brief, in view of the undisputed fact that Ndaw had not even applied for FMLA leave, suggests that the Respondent is unsure of the merit of its stated reason for termination—failure to request a leave of absence. "Shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation." [Citations omitted.] *U. S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001).

The letter discharging Ndaw for job abandonment bears the date July 22. Trice sent a similar letter bearing the same date to Weyman Maxson, a part-time employee who also worked for the sheriff's department. Trice did not know the last day that Maxson had worked, and the letter to him does not mention a leave of absence or the last day that Maxson worked. On no other occasion had the Respondent discharged any employee for job abandonment. Trice knew why Ndaw was not at work; he had seen the letter from his physician. I find that he sent the letter to Maxson in an attempt to portray Ndaw's discharge as nondiscriminatory.

Hankins' claimed that he made the tape recording of the voice mail message that Ndaw had left in the early morning of July 23 because, when he spoke with Ndaw later that day, Ndaw stated that Hankins had approved his leaving and, according to Hankins, that was not true. I have not credited Hankins' claim that he had a telephone conversation with Ndaw on July 23 in which Ndaw, who was in Africa, agreed to meet him on July 26. Insofar as the voice mail message, which Hankins had not deleted, made no mention of leave approval, it was irrelevant. There would have been no reason whatsoever to have saved that message in which Ndaw stated that he would be returning on August 2 unless Hankins had an ulterior motive.

Hankins admitted that he and Trice expected Ndaw to return and that they had discussed this. He did not testify regarding the context in which they discussed it. I find that they discussed Ndaw's impending return upon Hankins' report of receipt of the voice mail message. I further find that Trice determined to prevent that return by discharging shop steward Ndaw for failure to request a leave of absence, an offense that, if committed, had occurred almost three months before, in late April, and for job abandonment, an offense that documentary evidence establishes the Respondent had never before cited. I find that the decision to discharge Ndaw was made on July 23, and that the letter dated July 22 was written on July 23. Hankins, who admitted that he had not deleted the voice mail message, recorded that message which reflects that it was left in the early morning of July 23. Hankins' rationale for recording the message had nothing to do with leave approval. He recorded it in an attempt to show that the discharge letter had been written before the Respondent was aware of Ndaw's impending return. In an attempt to show that the discharge of Ndaw was not discriminatory, Trice also discharged Maxson without even determining his last day of work and dated that letter July 22.

Even if I were to have found that the job abandonment letter was written on July 22, before the Respondent knew of Ndaw's impending return, there is no reason that, upon learning of his return, the Respondent could not have rescinded its action. Hankins admitted that he and Trice expected Ndaw to return. The physician's letter refers to a three-month period of treatment. Trice, consistent with his practice of trying "to get ahold of that [absent] employee to find out the reason why," claims that he tried to reach Ndaw by telephone before discharging him. The very next day, July 23, three months after the physician's letter dated April 23, Trice learned from Hankins that Ndaw had called and stated that he would be returning on August 2.

Ndaw did not abandon his job, and the Respondent knew that he had not abandoned his job. He understood that he had Hankins' approval to leave. Hankins, although testifying that leaves of absence must be approved in writing, knew that he had not approved a leave of absence for Ndaw in writing. If, as the termination letter states, the Respondent considered Ndaw to have abandoned his job because he failed to request a leave of absence, he would have been discharged in early May. Any doubt of the Respondent's discriminatory motivation is erased by the August 4 reinstatement of employee Mohamed Haji who had been terminated on July 27 for insubordination. Unlike Ndaw, who had no disciplinary warnings, Haji had multiple warning including "a major security failure." The General Counsel has established that Ndaw's union activity was the motivating factor for his discharge. The Respondent, utilizing the pretext of job abandonment, sought to rid itself of a steward and key union member when it learned that he would be returning to work. When the reason given for the adverse employment action is either false, or does not exist, the Respondent has not rebutted General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I find that the Respondent discharged Ndaw because of his union activities in violation of Section 8(a)(3) of the Act.

D. The Warning of Carlos Romero

1. Facts

On November 2, Branch Manager Hankins called Romero to his office and issued him a written corrective action notice for failing to follow proper procedures. The notice stated that the

next violation could result in suspension or termination. The Notice was predicated upon an incident that had occurred on October 27. On that date, Romero had served as a guard while employee Jermaine Stevens, a messenger, was replenishing the ATM at a Kroger grocery store. Thereafter, it was discovered that the ATM was out of balance by over $2000. It was ultimately determined that there was no loss of money, rather, the error, made by Stevens, was clerical. When the discrepancy came to the attention of the Company, State Manager Trice questioned Stevens. Stevens reported that he had "panicked" when he realized that an unknown man was standing near him and that Romero, his guard, had walked away from him to tell someone "that the banner or sign they had posted was misspelled."

Trice determined not to issue any discipline until hearing Romero's side of the story. He requested that Stevens write a statement, and he requested Hankins to speak with Romero. Trice acknowledged that it would not be fair to discipline an employee without having both sides of the story.

Hankins wrote the warning to Romero on November 1 after speaking with Stevens and reading the statement that he had prepared and without speaking with Romero. He denied that the corrective action notice constituted discipline because Romero was not demoted or suspended. He acknowledges calling Romero in, reading him the corrective action notice, and asking him to sign it. Romero refused. The warning does not name Stevens. In pertinent part it states that Romero "walked away from your partner and . . . initiated the conversion with this group of people . . . . You turned your back away from the Bantek employee servicing [the] ATM . . . . "

Romero, although refusing to sign the warning, told Hankins that he did not "turn my back to my messenger," that he knew there was a man standing next to the machine and that he "had the situation under control." He explained to Hankins that that there was a group of people and that one of them came up and asked how to spell a word, but he responded that he was "busy right now, I'll be right with you," and that throughout he had his hand on his gun and "I had my eyes on the man." Hankins did not respond, and Romero stated that he could not believe that he would go by what the other employee had said without giving him, Romero, the opportunity to write a statement. Hankins stated that he could do so in disagreeing with the Corrective Action Notice. Romero answered, "[I]t's too late now. . . . I will file charges on you based on this allegation."

Hankins acknowledges that Romero responded to the accusations set out in the warning after he issued it, but testified that he did so on the following day, at which time Romero showed him the correct spelling of the misspelled word. Romero acknowledges writing the word correctly at Hankins' request. In view of the fact that the warning had admittedly been issued, it is immaterial when Romero made his response insofar as it had no bearing upon the Company's action. Regarding Romero's response, Hankins testimony was as follows:

> I asked him what happened. He says, well, basically the person came up to him, and said that -- you know, asked him if the word was spelled correctly or something like that, so I asked him, well, what happened when the man was standing behind your partner, he says, well, I seen him. I said, well, why didn't you do anything, and he didn't -- you know, he didn't have an answer for that.

The foregoing testimony is silent regarding how Romero responded to the person who asked about the spelling. It does not deny that Romero informed Hankins that he told the person that he was busy. It does not deny that, after confirming that he saw the man, Romero explained that he had the situation under control. Hankins says he asked Romero why he did not do anything and that Romero "didn't have an answer for that." I find that Romeo "didn't have an answer" because nothing needed to be done; he had the situation under control.

At the hearing, Romero credibly denied that he had initiated any conversation or that he had been involved in any conversation. He acknowledged that he was approached by an individual whom he did not know who asked if a certain word was spelled correctly in Spanish. He had no idea why that individual would have thought that he spoke Spanish, although he does speak Spanish. Romero informed the individual that he was busy and would speak with him later, although he did not actually do so. He assumed his position as guard, approximately 15 feet from the ATM machine that Stevens was replenishing. He explained that guards remain at that distance so that a potential robber cannot cover both employees with one gun. Although Trice asserted, on the basis of the report of Stevens, that Romero should have been closer, he did not disagree with the rationale stated by Romero for being in the location that he placed himself. Romero testified that he made and held eye contact with the individual who was near the ATM machine and was in control of the situation. Romero did not observe Stevens do anything to indicate that he was startled by the man near the machine.

Romero testified that Stevens did not mention his alleged inattention to him at any time. Stevens, when giving his written statement to Trice, reported that he panicked and that, when he finished with the machine, "I told my guard that I know that I messed up that machine because I lost track of what was going on when I stood up to call [him] back away from talking to the other merchants inside of the Kroger." I am satisfied that if Stevens was aware that he "messed up that machine" and "lost track of what was going on" because of alleged inattention by Romero that he would have reported that fact to his superiors. No such report was made. The first occasion upon which Stevens reported any alleged inattention by Romero to management was when he was questioned by Manager Trice about a discrepancy with the ATM machine that he had serviced. I credit Romero that Stevens said nothing to him.

Stevens, in August, had been suspended when $50,000 in cash on the truck to which he was assigned could not be found on Monday, August 2. Although the truck was searched twice, the money was not found on the truck. On Wednesday, August 4, Stevens reported that he had found the money on the truck. He was suspended pending the outcome of a polygraph examination which he passed and was returned to work.

2. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, supra, I find that the Respondent was fully aware

of the union activity in which Chief Shop Steward Romero was engaging. In addition to the Respondent's general animus, the Respondent bore specific animus towards Romero as established by the coercive meeting of October 22 in which Hankins accused Romero of writing a letter to Company President Houkum and then interrogated him regarding whether he knew why the site of contract negotiations had been changed. Contrary to Hankins' assertion that the corrective action notice did not constitute discipline, I find that it did constitute discipline and was an adverse action that threatened Romero's continued employment. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for the Respondent's action.

The General Counsel having established a prima facie case, the burden shifts to the Respondent to establish that Romero would have been disciplined in the absence of any union activity on his part.

I find that Romero, consistent with his credible testimony, was not inattentive and did have the situation under control. Contrary to the statement in the Respondent's brief, Romero did not admit that he was distracted. He specifically and credibly denied that he got distracted. When an unidentified individual approached him asked him about the correct spelling of a Spanish word, Romero dismissed the individual, stating that he was busy. The Respondent's brief suggests that Romero's showing Hankins the word that was misspelled but offering no further explanation confirms his inattention. I disagree. As a guard, Romero was alert to the entire situation. There is no reason to believe that he would not have observed an error in the Spanish word when surveying the area into which he and Stevens were entering, especially when someone asked him about it. Stevens' statement reflects that he also was aware of the misspelling. I have credited Romero's testimony that, after being presented the warning, he did give an explanation. Romero protested the warning and told Hankins that he had his hand on his gun and "I had my eyes on the man." Hankins did not deny that Romero gave the foregoing explanation. He obviously did not take Romero's denial of inattention into account because he had already issued the discipline to him.

Romero credibly testified that Stevens did not make a contemporaneous compliant to him regarding his alleged inattention and that testimony is corroborated by the evidence that the first occasion upon which the Respondent's management became aware of a claim of inattention by Romero occurred when Stevens sought to explain why he had made an error when servicing the ATM machine at the Kroger store. There is no evidence that either Trice or Hankins questioned Stevens regarding why he, before being questioned about the $2000 discrepancy, had not reported that he had "messed up that machine" due to Romero's alleged inattention.

I am mindful that Stevens was unavailable as a witness, having been deployed by the armed forces of the United States. The issue, however, is not the truth of Stevens' report. The issue is the Respondent's reliance upon that report without obtaining Romero's side of the story. State Manager Trice acknowledged that it would be unfair to discipline an employee without getting both sides of the story. That is exactly what Hankins did.

The Respondent could certainly choose to believe Stevens rather than Romero after obtaining both sides of the story, but its failure to obtain Romero's side of the story prior to issuing to him what was effectively a final warning confirms the Respondent's discriminatory intent. Hankins prepared and issued the discipline to Romero without obtaining his side of the story. "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). When addressing discriminatory discipline, the Respondent "not only must separate its tainted motivation here from any legitimate motivation, but it must persuade that its legitimate motivation outweighs its unlawful motivation so much that the Company would have imposed the discipline even in the absence of any union activities." *Formosa Plastics*, 320 NLRB 631, 648 (1996). The Respondent has not done so.

The Respondent argues that it relied upon "Steven's verbal report and written statement" and that "[a]fter full investigation" took appropriate disciplinary action. Although the Respondent did rely upon Stevens' report, there was not a full investigation. In the course of the Respondent's investigation regarding the $2000 discrepancy in the ATM machine, Stevens accused his fellow employee of inattention. There was no investigation regarding Romero's alleged inattention.

The General Counsel established that Romero's union activity was "a substantial and motivating factor" in its action. An employer may not assert a reasonable belief that an employee has engaged in misconduct based upon an unfair investigation. *Midnight Rose Hotel & Casino*, 343 NLRB No. 107, slip op. at 3 (2004). In the instant case, there was no investigation. Upon receiving Stevens' report, Hankins prepared the disciplinary notice for Romero and then issued it to him. The Respondent has not established that Romero would have been warned in the absence of his union activity. By warning Carlos Romero because of his union activity, the Respondent violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By interrogating employees, creating the impression that employee union activities were under surveillance, threatening that the employees' selection of the Union as their collective-bargaining representative was futile, prohibiting conversation relating to the Union on company time while permitting non-work related conversations regarding other subjects, and prohibiting employees from discussing their terms and conditions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Mouhamadou Ndaw on August 6, 2004, because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By warning employee Carlos Romero on November 2, 2004, because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatory discharged Mouhamadou Ndaw, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily warned Carlos Romero, it must rescind the warning.

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Bantek West, Inc., Marietta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, warning, or otherwise discriminating against any employee for supporting United Federation of Security Officers, Inc., or any other union that represents guards.

(b) Coercively interrogating employees regarding their union activities.

(c) Creating among employees the impression that their union activities are under surveillance.

(d) Threatening that the employees' selection of the Union as their collective-bargaining representative was futile.

(e) Prohibiting conversation relating to the Union while permitting other nonwork related conversations between and among employees and prohibiting employees from discussing their terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mouhamadou Ndaw full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Mouhamadou Ndaw whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, rescind the warning issued to Carlos Romero.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Mouhamadou Ndaw and the unlawful warning issued to Carlos Romero, and within 3 days thereafter notify them in writing that this has been done and that the foregoing actions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Marietta, Georgia, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 10, 2005

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

EDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, warn or otherwise discriminate against any of you for supporting, United Federation of Security Officers, Inc., or any other union that represents guards.

WE WILL NOT coercively interrogate any of you regarding your union activities.

WE WILL NOT create among you the impression that your union activities are under surveillance.

WE WILL NOT threaten you that your selection of the Union as your collective bargaining representative was futile.

WE WILL NOT prohibit you from talking about the Union with your fellow employees while permitting you to engage in other nonwork related conversations and WE WILL NOT prohibit you from discussing your terms and conditions of employment.

WE WILL within 14 days from the date of the Board's Order, offer Mouhamadou Ndaw full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, rescind the warning issued to Carlos Romero.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning issued to Carlos Romero and the unlawful discharge of Mouhamadou Ndaw and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the foregoing actions will not be used against them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

BANTEK WEST, INC.